IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 97-N-542

KOLE ARIJE,

Plaintiff,

v.

EDWARD J. DAVID, an Individual

Defendant.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Patricia A. Coan, United States Magistrate Judge

Plaintiff, *pro se,* brought this civil rights case alleging violations of his Fourth Amendment rights arising out of events on August 11, 1995, when defendant David accompanied plaintiff's former employee, Catria Lee, to plaintiff's place of business to collect her belongings and then issued a citation to plaintiff for petty theft for failing to produce a typewriter Lee claimed was hers.

An April 22, 1997 Order of Reference under 28 U.S.C. 636(b) and D.Colo.LR 72.4 referred dispositive motions to the undersigned magistrate judge for recommendation. An earlier recommendation, dated March 10, 1998 was adopted and upheld in a March 9, 1999 order of the court. That order granted summary judgment and dismissed all claims and all defendants with the exception of plaintiff's Fourth Amendment claim against defendant David. Plaintiff was directed to file an amended complaint setting forth that claim in more detail. An amended complaint was filed on March 29, 1999.

The matters before the court are plaintiff's "Brief in Support of Motion for Summary

Judgment" [filed November 4, 1999][1]; defendant David's Cross Motion for Summary Judgment [filed November 17, 1999]; and Plaintiff's Cross Motion [for summary judgment] [filed November 22, 1999].[2] The motions have been fully briefed[3] and the court finds that oral argument would not materially assist the recommendation. For the reasons set forth below, it is recommended that David's cross motion for summary judgment be denied and that plaintiff's motions be denied.

I. Background

In his amended complaint, plaintiff essentially repeats all of the factual allegations in his original complaint, but states that his claim under 42 U.S.C. §1983 is limited to David's unlawful search and seizure in violation of plaintiff's Fourth Amendment rights.

The following undisputed relevant facts are contained in the parties' pleadings. Plaintiff hired defendant Catria Lee as a trainee at his travel agency during the summer of 1995. Amended Complaint, ¶¶5-7. On August 7, 1995, after returning from a week of training in Houston, paid for by plaintiff's travel agency, Lee informed plaintiff that she was no longer interested in working for him. *Id.* ¶19. Plaintiff advised Lee that if she left the office she would not be allowed to return as either a trainee or an employee. *Id.* ¶20. Lee left plaintiff's office but returned two days later. *Id.* ¶21. Plaintiff and Lee got into an argument and plaintiff instructed Lee to leave or he would call the police. *Id.* At that point, Lee called the police and officers arrived at plaintiff's office. *Id.* The situation was explained to the officers and Lee decided to pack her belongings at the office and leave the premises. *Id.* Plaintiff told Lee that

[1] Plaintiff did not file a *motion* for summary judgment, so that his request for summary judgment as set forth in this brief is not reflected as a pending motion on the court's docket.

[2] The Cross Motion is not reflected on the court's docket.

[3] Defendant David did not file a response to plaintiff's November 22, 1999 cross motion.

as soon as she returned some of plaintiff's belongings, which Lee had taken from the office, plaintiff would allow her to remove her belongings from the office. *Id.* When plaintiff asked Lee what items she had left in the office, Lee responded that she had some cassettes and compact discs there. *Id.* On August 11, 1995, Lee returned to plaintiff's office with the office items belonging to plaintiff which she had taken home. *Id.* ¶23. She was asked to leave the office and returned shortly thereafter with defendant Officer David. *Id.* ¶¶23-24. Plaintiff alleges he told Lee and David to leave but that they rummaged through his office desk and other furniture. *Id.* ¶¶28-29. David demanded that plaintiff produce everything Lee claimed was left in the office. *Id.* ¶25. David threatened to charge plaintiff for petty theft for whatever Lee could not find at the office. *Id.* ¶26. Plaintiff and Lee collected Lee's belongings and then David asked Lee if she had "all her things." *Id.* ¶27. When she replied that she did not have her typewriter, David ordered plaintiff to produce the typewriter. *Id.* Although plaintiff asked them to leave, Lee and David went upstairs to plaintiff's office, rummaged through his desk and file cabinets and came back downstairs. *Id.* ¶¶28-30. They told plaintiff they had not been able to locate the typewriter and for that, he would be charged with petty theft. *Id.* ¶30. When the typewriter was not found, David issued a written citation to plaintiff for petty theft. *Id.* ¶¶30-31.

II. Standard of Review

Defendant David moves for summary judgment on the grounds of qualified immunity. Plaintiff has moved for summary judgment against David, incorporating by reference his earlier motion for summary judgment filed July 29, 1997. Plaintiff urges the court to accept the same arguments previously raised in his July 29,1997 motion for summary judgment because no new facts or new evidence has surfaced since submission of that motion. *See* Pl. Brf. [filed November 4, 1999], at 2.

The purpose of summary judgment is to determine whether trial is necessary. *White v. York Int'l. Corp.*, 45 F.3d 357, 360 (10th Cir. 1995). Summary judgment is appropriate under Fed.R.Civ.P. 56(c) when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). When applying this standard, the court reviews the pleadings and documentary evidence in the light most favorable to the non moving party. *Gray v. Phillips Petroleum*, 858 F.2d 610, 613 (10th Cir. 1988). To defeat a properly supported motion for summary judgment, "there must be evidence upon which the jury could reasonably find for the plaintiff." *Panis v. Mission Hills Bank, N.A.*, 60 F.3d 1486, 1490 (10th Cir. 1995), quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Speculation, supposition and unsupported factual allegations will not establish an issue of material fact necessitating trial. *Henry v. Price,* 996 F.2d at 1064, 1068 (10th Cir. 1993).

On cross motions for summary judgment, the court may assume that no evidence other than that submitted by the parties need be considered; however, summary judgment is inappropriate if the court finds that disputes remain as to material facts. *James Barlow Family Ltd. Partnership v. David M. Munson, Inc.*, 124 F.3d 1321, 1323 (10th Cir. 1997)(internal citation omitted).

III. Legal Analysis

A. Plaintiff's Motions for Summary Judgment

Plaintiff moves for summary judgment in his favor in his brief filed on November 4, 1999 based on the same arguments raised in his July 29, 1997 Motion. The court considers this filing to be plaintiff's attempt to have the court reconsider the previous arguments he made with

respect to Officer David and the unlawful search allegation. Plaintiff's July 29, 1997 motion for summary judgment was denied by the court on March 9, 1999 and the matter is now the law of the case. Notwithstanding, for the same reasons stated in the April 1998 Recommendation, and incorporated here by reference, plaintiff's motions for summary judgment should again be denied.

B. Defendant David's Cross Motion for Summary Judgment

Plaintiff brings a 42 U.S.C. §1983 claim against David individually for an unlawful search or seizure in violation of plaintiff's Fourth Amendment rights as applied to state actors through the Fourteenth Amendment. Defendant David has moved for summary judgment on the ground of qualified immunity, contending that no unlawful search occurred because "[p]laintiff admits that he never saw Officer David touch any items in his office and doubts that he did so." *See* Def. Response and Cross Motion for Summary Judgment [filed November 17, 1999] at 5.

The qualified immunity defense is available to public officials in their individual capacities. Qualified immunity shields public officials from civil damages liability if their actions did not "`violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Derda v. City of Brighton, Colorado*, 53 F.3d 1162, 1163-64 (10th Cir. 1995). In the context of summary judgment, the court first determines whether the conduct of which plaintiff complains constitutes a violation of a constitutional right; if so, the court then addresses whether that right was clearly established at the relevant time. *Gehl v. Koby*, 63 F.3d 1528, 1533 (10th Cir. 1995)(citing *Siegert v. Gilley*, 500 U.S. 226, 232-33 (1991)). Plaintiff must therefore "present facts which if true would constitute a violation of a clearly established law." *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642, 646 (10th Cir. 1988)(quoting *Dominique v. Telb*, 831

F.2d 673, 677 (6th Cir. 1987)(internal citation omitted)). The plaintiff must articulate "with specificity" the clearly established constitutional right. *Romero v. Board of County Commissioners*, 60 F.3d 702, 704 (10th Cir. 1995). "It is insufficient simply to 'identify in the abstract a clearly established right and allege that the defendant has violated it.'" *Derda*, 53 F.3d at 1163-64. If plaintiff meets his burden, the defendant must then demonstrate that no material issues of fact remain which would defeat the claim of qualified immunity. *Losavio*, 847 F.2d at 646.

Plaintiff's unlawful search or seizure claim arises out of the incident which occurred at plaintiff's business on August 11, 1995, when defendant David allegedly searched plaintiff's office without permission and without a warrant for a typewriter which a former business associate claimed to have left there.[4]

The Fourth Amendment to the Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." United States Constitution, Amendment IV. It is applied to the states through the Fourteenth Amendment due process clause. *Wolf v. Colorado*, 338 U.S. 25 (1949).

The warrant clause of the Fourth Amendment applies to searches on commercial premises. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311-12 (1978).

The court must first determine whether plaintiff can claim that his Fourth Amendment rights were violated when defendant David entered plaintiff's business. A warrantless search

[4] The "Statement of Probable Cause" contained in the petty theft complaint issued to plaintiff by officer David states that he responded to a call from Lee for a civil "stand by" officer to be present at plaintiff's office while Lee retrieved her belongings. Defendants' Ex. A to Defs. May 19, 1997 Motion for Summary Judgment; Plaintiff's Response, Exhibits, pp. 2-3.

is unreasonable, and therefore unconstitutional, if the defendant has a legitimate expectation of privacy in the area searched. The burden is on plaintiff to show that he had such an expectation. *See United States v. Conway*, 73 F.3d 975, 979 (10th Cir.1995); *United States v. Gordon*, 168 F.3d 1222, 1225 (10th Cir. 1999). "Determining whether a legitimate or justifiable expectation of privacy exists ... involves two inquiries." *United States v. Leary*, 846 F.2d 592, 595 (10th Cir.1988). First, the individual "must show a subjective expectation of privacy in the area searched, and second, that expectation must be one that 'society is prepared to recognize as "reasonable." ' " *Id.* (quoting *Hudson v. Palmer*, 468 U.S. 517, 525 (1984)). The ultimate question is whether one's claim to privacy from the government intrusion is reasonable in light of all the surrounding circumstances. *United States v. Anderson*, 154 F.3d 1225, 1229 (10th Cir. 1998), *cert. denied*, 526 U.S. 1159 (1999). Generally, an individual's expectation of privacy in commercial premises is "less than, a similar expectation in an individual's home." *New York v. Burger*, 482 U.S. 691, 700 (1987)); *see also Gordon*, 168 F.3d at 1226.

On the date complained of, plaintiff's place of business was open, and he was attending to customers during normal business hours when Lee and defendant David arrived. The court thus finds that plaintiff did not have a legitimate expectation of privacy in the open areas of his business premises. *See Katz v. United States*, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."). The question then becomes whether Arije had a legitimate expectation of privacy to his work area away from customers or in his office, desk drawers and file cabinets which he claims were ransacked. "Given the great variety of work environments, the question whether an employee has a reasonable expectation of privacy [in his work area] must be addressed on a case by case basis." *Anderson*, 154 F.3d at 1229.

In his amended complaint, plaintiff stated that while he was working with customers, Lee and David "went back upstairs to plaintiff's office rummaged through his desk and the drawers, checked file cabinets, the back of rooms and went back downstairs." *See* Amended Complaint, ¶29. Arije testified that Lee and David went to a "back room." Def. Resp. and Cross Motion, Arije Deposition, at 37. Defendant does not deny that that was the sequence of events.

Plaintiff has thus set forth enough facts to show that his office was in an area separate from the customer service area and that the office contained a desk and file cabinets. It is well established that an employee has a reasonable expectation of privacy in his office. *Anderson* 154 F.3d at 1230 (citing *Mancusi v. DeForte*, 392 U.S. 364, 369 (1968)). Because defendant does not dispute plaintiff's statements as to the location of the areas searched, the court finds that plaintiff has provided information sufficient to raise a genuine issue of material fact as to whether he had a reasonable expectation of privacy in his office, desk and file cabinets, because the law concerning the right to privacy in one's office had been clearly established since the 1968 *Mancusi* decision.

David argues that the Fourth Amendment is not implicated because he, personally, did not search or otherwise rummage through plaintiff's personal belongings. *See* David Resp. and Cross Motion, David Affidavit, ¶4. Plaintiff stated in his deposition that he "doubted" whether David physically touched any items in plaintiff's office. *Id.*, Arije Deposition at 51. Plaintiff also stated however, that Lee and David went to the back room (*id.* at 37) and that he was not "able to tell" whether David touched any items in plaintiff's office although he did not personally see David touch any items in his office. *Id.* at 54-55. Plaintiff states that David probably did handle some items while helping Lee search because Lee has only one hand and could not pick up some items by herself. *Id.* at 57.

The court finds that plaintiff has provided sufficient evidence that plaintiff was waiting on customers while Lee and David were in an area out of plaintiff's sight which contained plaintiff's desk, file cabinets and office; and, that, Lee, in David's presence, went though plaintiff's office, desk and file cabinets looking for her belongings. What is disputed is whether defendant David actually touched any of plaintiff's possessions or searched plaintiff's office, containing his desk and file cabinet. Resolution of this disputed fact question is for the finder of fact.

Assuming that David did not touch any items in plaintiff's office, desk and filing cabinets, the next issue is whether David's presence and statements nonetheless converted Lee's private search into one rising to the level of governmental action subject to the Fourth Amendment.

As the Supreme Court said in *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967), "[t]he basic purpose of th[e Fourth] Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." (emphasis added). The Fourth Amendment does not concern private action; it "proscrib[es] only government action; it is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.' " *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (internal citation omitted).

The Tenth Circuit test to determine when a search by a private person becomes government action is a two-part inquiry: "1) whether the government knew of and acquiesced in the intrusive conduct, and 2) whether the party performing the search intended to assist law enforcement efforts or to further his own ends." *Pleasant v. Lovell*, 876 F.2d 787, 797 (10th Cir.1989) (*Pleasant I*) (citations omitted). Both prongs of the test must be met before it is governmental conduct. *Id.*; *Pleasant II*, 974 F.2d 1222, 1226 (10th Cir. 1992).

Here, David has argued that Lee performed the search and that he did not. Plaintiff maintains that because David ordered plaintiff to search for Lee's belongings, including the typewriter, the search was cloaked with governmental authority. Plaintiff further states that David told plaintiff to produce the typewriter or plaintiff would be cited for petty theft. David does not dispute his presence during Lee's search of plaintiff's office, desk and file cabinets. *See United States v. Leffall*, 82 F.3d 343, 347(10th Cir. 1996). The court thus finds that David's presence was knowledge of and acquiescence in the search in order to met the first part of the test.

The next question is whether in performing the search, Lee was advancing her own interests or those of law enforcement. In order to show governmental participation in a private individual's search, the court must determine whether the government agent is involved in the search either directly as a participant, or indirectly as an encourager of the private person's search. *Leffall*, 82 F.3d at 347 (internal citation omitted). It is undisputed that Lee was present on Arije's business premises to collect her personal belongings. Plaintiff admitted that he had an agreement with her in that she was to return any items that belonged to the office and she could then collect her cassettes and CDs. *See* Amended Complaint, ¶21. Plaintiff admits that Lee requested the assistance of a police officer when she came to collect her things. *Id.*, ¶¶22-24. Plaintiff claims David threatened him with a petty theft citation if he did not produce a typewriter Lee claimed belonged to her. *See id.* ¶27. When plaintiff could not produce the typewriter, he was cited for petty theft. *Id.*, ¶¶30-31.

When an officer is present during a private search and threatens to arrest the occupant of the premises if he interferes with the search, the private search is cloaked with sufficient governmental authority to implicate the Fourth Amendment. *See Specht v. Jensen*, 832 F.2d

1516 (10th Cir. 1987). In *Specht*, the court reasoned that the officer's threats to take the plaintiff to jail if he obstructed a private party's search for a computer was an "important affirmative contribution to the private conduct." *Specht*, 832 F.2d at 1523.

Here, plaintiff stated in his deposition that David said "if I don't give her what is hers, because a deal is a deal, I will be charged." *See* Def. Cross Motion, Arije deposition, at 32. Plaintiff also said "when somebody comes into my office without a warrant and starts threatening to jail you because you did not provide something inside that office to a dismissed employee, I would think this is a threat that is somehow unwarranted." *Id.* at 40.

The court finds that plaintiff has produced evidence that David was not a mere innocent bystander. He was present in the office area when Lee conducted the search; he threatened to charge plaintiff with petty theft for anything not found during Lee's search; and, he may have ordered plaintiff to produce the typewriter. *See* Amended Complaint, ¶26, 29, 30; Arije deposition, at 32, 40. The court thus finds that plaintiff has produced sufficient evidence to raise a genuine issue of material fact as to whether David's threat and issuance of the citation contributed to Lee's private search so that it became cloaked with governmental authority, invoking the protections of the Fourth Amendment under *Leffal* and *Specht*.

David finally argues that he should be granted qualified immunity because plaintiff gave his consent to the search. Def. Resp. and Cross Motion [filed November 17, 1999] at 3. Plaintiff responds that he never gave David permission. Pl. Reply and Cross Motion [filed November 22, 1999] at 1.

Police presumptively violate the Fourth Amendment when they engage in a warrantless search and no exception to the warrant requirement applies. *See Thompson v. Louisiana*, 469 U.S. 17, 19-20 (1984). A warrantless search or seizure is per se unreasonable unless shown to fall within one of a carefully defined set of exceptions. *Coolidge v. New Hampshire*, 403 U.S.

443, 474 (1971). Where an individual has consented to the search, however, no warrant is necessary. In order to find consent, a court must find from the totality of the circumstances that (1) the consent was voluntary, and (2) the search did not exceed the scope of the consent. *United States v. Price*, 925 F.2d 1268, 1270 (10th Cir. 1991). Through "clear and positive" testimony, the court must find that the consent was "unequivocal and specific" and "freely and intelligently" given, and the government must prove that consent was given without duress or coercion. *See United States v. Lowe*, 999 F2d 448, 450 (10th Cir. 1993)(internal citations omitted).

Applying those standards to the facts, the court finds that David was present at plaintiff's place of business in response to a request for assistance from Lee. Arije says that Lee and David ignored plaintiff's plea to leave (Amended Complaint, ¶29). Plaintiff did not object to Lee's search of the office for her personal property; instead, he objected to David's ordering him to search for Lee's belongings under threat of citation for petty theft.

Plaintiff maintains that while he did give Lee consent to look for her belongings, he did not give David permission. Arije said "No. I mean, what could I do? What permission?" Arije deposition, at 38. Arije said he found the manner in which David walked around the office to be intimidating: "Of course it was intimidating. He is telling me if I don't give her. . .what is hers, a deal is a deal, I will be charged. . . When somebody comes into my office without a warrant and starts threatening to jail you because you did not provide something inside that office to a dismissed employee, I would think this is a threat. . .." *Id.* at 39-40. Plaintiff says he could not have given his voluntary consent to the search because he was intimidated by David's presence.[5] *Id.* at 39. "The man was with his chest up, . . .walking like a big terrorist man. . ."

[5] Courts have acknowledged several factors in the context of analyzing the validity of Fourth Amendment searches and seizures to determine whether a reasonable person could believe that he is not free to disregard the police officer, such as: the threatening presence of several officers; the brandishing of a weapon by an officer; some physical touching by an officer; use of aggressive language or tone of voice indicating that compliance with an

Id. at 38. Arije testified that David threatened to charge plaintiff with petty theft if plaintiff was unable to find what Lee was claiming was hers. *Id.* at 39. Arije said that David "starts threatening to jail you because you did not provide something in that office to a dismissed employee" (*Id.*, at 40), "with guns in his hands, with a [Denver police] badge. . ." *Id.* at 52.

The court finds that Arije did not give unequivocal consent to search to David and that Arije has provided evidence to support his claims that he was threatened by David's presence, that he was intimidated by David's badge and guns, and that David threatened to charge or jail him for petty theft if he did not produce all the items that Lee claimed were hers. Further, to the extent that David claims there is some evidence of "consent," Arije has presented sufficient evidence to raise a genuine issue of material fact as to whether consent was given and, if so, whether any consent given was under duress or coercion in light of David's threats and his presence armed and in uniform. Because of the factual discrepancy between whether David believed plaintiff was giving consent to the search and plaintiff's repeated statements and argument that he did not give consent because he was intimidated by David's presence, the court finds that Arije has provided enough evidence to raise a genuine issue of material fact as to whether he gave his consent to the search so that summary judgment is inappropriate.

IV. Recommendation

Accordingly, for the reasons stated in this Recommendation, it is

RECOMMENDED that plaintiff's Brief in Support of Motion for Summary Judgment [filed November 4, 1999], to the extent it could be considered a motion renewing plaintiff's July 1997 motion for summary judgment, be **denied** in its entirety. It is further

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officer's request is compulsory; prolonged retention of a person's personal effects such as identification and plane or bus tickets; a request to accompany the officer to the station; interaction in a nonpublic place or a small, enclosed space; and absence of other members of the public. *United States v. Sanchez*, 89 F.3d 715, 718 (10th Cir.1996) (internal citation omitted).

RECOMMENDED that Plaintiff's cross motion for summary judgment [filed November 22, 1999] be **denied** in its entirety. It is further

RECOMMENDED that Defendant David's Cross Motion for Summary Judgment [filed November 17, 1999] be **denied**.

Within ten days after being served with a copy of the proposed findings and recommendation, any party may serve and file written objections to the proposed findings and recommendation as provided by Rules of court. The district court judge shall make a de novo determination of those portions of the proposed findings or specified recommendation to which objection is made. The district court judge may accept, reject, or modify, in whole or in part, the proposed findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

Failure to make timely objections to the magistrate judge's recommendation will bar an appeal from a judgment of the district court based on the findings and recommendations of the magistrate judge.

Dated May 23, 2001.

BY THE COURT:

Patricia A. Coan
United States Magistrate Judge